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Federalization: A Critical Overview

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FEDERALIZATION: A CRITICAL OVERVIEW

*William P. Marshall**

INTRODUCTION

In a letter to Chief Justice William Rehnquist, Attorney General Janet Reno, then-Senate Judiciary Chair Joseph Biden and then-House Judiciary Chair Jack Brooks, Ninth Circuit Chief Judge J. Clifford Wallace suggested that a three-branch conference be convened to initiate a process to evaluate "new federal law and its impact on the federal court system."¹ To Judge Wallace, the primary reason for engaging in such a study was a concern about federal court docket control:

The dramatic growth in the federal caseload, especially before the Courts of Appeals, has serious implications for the federal judiciary. Obviously, clogged dockets have resulted in increased delay and expense. Some of the negative consequences are more subtle, yet just as real. As we are called upon to resolve more and more cases, our ability to focus attention on any one case must necessarily diminish, and the quality of our work will suffer. In addition we have been forced to adopt, and will continue to adopt, shortcuts to cope with the rising volume: we hear fewer oral arguments, publish fewer opinions, and rely more heavily on law clerks and staff attorneys. The heavy volume of cases thus threatens the ability of the federal judiciary to give each case the attention and care it deserves.²

While Judge Wallace's concerns are more than justified,³ federal

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1. Letter from Ninth Circuit Court of Appeals Judge J. Clifford Wallace, to Chief Justice William Rehnquist, Attorney General Janet Reno, then-Senate Judiciary Chair Joseph Biden, and then-House Judiciary Chair Jack Brooks [hereinafter "Wallace Letter"] (Mar. 29, 1993). See Appendix A.

2. *Id.*

3. See Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. REV. 67, 94 (stating that the increase in the federal caseload threatens the quality of the federal judiciary); William W. Schwarzer & Russell R. Wheeler, *On the Federalization of the Administration of Civil and Criminal Justice*, 23 STETSON L. REV. 651, 694-700 (1994) (citing statistics showing an increasing number of federal criminal and civil cases commenced, an increasing number of cases commenced per judge, and an increase in judiciary appropriations). See generally COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE UNITED STATES PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS 19-32, 71-86 (Nov. 1994).

court docket control is not the only problem potentially triggered by unchecked federalization. Federalization also imposes significant resource costs on federal prosecutors and prison systems.⁴ More broadly, the constant expansion of federal power through federalization undercuts many of the values achieved through federalism. These include preservation of the role of the states as experimenters in social policy⁵ and the maintenance of their role as a check on the power of the central government.⁶ Similarly, federalization's incursion into the traditional role of states as the primary source of the citizens' duties and obligations diminishes the authority and prestige of state institutions — including the authority and prestige of the state courts.⁷ Finally, federalization may directly impinge upon individual rights as the creation of federal crimes paralleling state offenses perils the protections for the individual found in the Double Jeopardy Clause.⁸

Creating a coherent approach to federalization, however, has proved elusive. Not only are the boundaries of when it is appropriate to federalize state law amorphous; but more importantly, the question of federalization in any concrete example is not easily separated from the substantive merits of the particular measure in question. For example, while federalization concerns entered into the debate over the recently enacted Crime Bill,⁹ they generally received mini-

4. The federalization of state civil law, while relatively inexpensive when limited to the federalizing of state causes of action, can become significantly more expensive if it also involves the creation of regulatory agencies or the creation of litigation support services.

5. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 730-31 (1963) ("Legislative bodies have broad scope to experiment with economic problems. . ."); Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229, 1233 (1994) (quoting Justice Sandra Day O'Connor's dissent in *FERC v. Mississippi*, 456 U.S. 742, 788-91 (1982) to demonstrate her praise of federalism as a vehicle for experimentation in government); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 907 (1994) (quoting Justice O'Connor's opinion in *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) to show the Court's approval of federalism because it allows for experimentation in government).

6. Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 6 (1990) (arguing that state power serves as a check on the federal government); accord Amar, *supra* note 5, at 1242; Rubin & Feeley, *supra* note 5, at 928-29.

7. See Schwarzer & Wheeler, *supra* note 3, at 668 ("Sweeping application of federal criminal laws to predominantly local offenses can nullify state policy on the prosecution of crimes and the punishment of offenders.").

8. See *Bartkus v. Illinois*, 359 U.S. 121, 127-39 (1959) (holding that where the defendant was tried and acquitted in federal court, subsequent trial in state court based on the same acts did not deprive defendant of due process of law under the Fourteenth Amendment).

9. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat.

mal consideration relative to the substantive discussion of the concrete proposals offered to address the nation's perceived crime problem.¹⁰

Judge Wallace, in short, is correct when he suggests, that the federalization phenomenon cries out for serious study.¹¹ The catch, however, is that since federalization is most often a secondary concern in evaluating proposed legislation, it is questionable as to how much effect serious study may have in addressing federalization concerns. To paraphrase Professor Thomas E. Baker, "Federalization is not law. It is politics."¹²

Undeterred, I will nevertheless attempt to analyze the federalization issue. Part I introduces the issue by noting the recent expansion in federalization.¹³ Part II discusses the judicial limitations on federalization imposed by the Supreme Court.¹⁴ It also addresses the political restraints that may serve to limit federalization. Part III offers a modest suggestion as to how the seemingly inexorable trend towards federalization might be mitigated. It contends that one argument often presented in favor of federalization — that a matter should be federalized because it is important to the national agenda — is fundamentally misconceived and may potentially damage both federalism concerns and the realization of the substantive goals of the particular matter for which federal legislation is sought.

I. BACKGROUND: THE TREND OF FEDERALIZATION

One of the central themes of the Republican's "Contract With America" proposes that power should be returned to the states.¹⁵

1796; see also 140 CONG. REC. H6559 (daily ed. Aug. 2, 1994) (statement of Rep. Sensenbrenner) (arguing that the Crime Bill should be rejected because it is "an assault on federalism").

10. See, e.g., Debra J. Saunders, *Uncle Sam's New Tin Star*, S.F. CHRON., Feb. 16, 1994, at A16, available in LEXIS, Nexis Library, Curnws File (noting that the question of whether crime control is a federal or state issue was barely debated in Congress).

11. Indeed, the good news is that the serious study of federalization is taking place at a wide range of forums including at the three-branch conference initially proposed in Judge Wallace's letter. See *infra* App. A.

12. Thomas E. Baker, *A View to the Future of Judicial Federalism: "Neither Out Far Nor In Deep,"* 1994 CASE W. L. REV. (forthcoming 1995) (manuscript at 38-39, on file with author) (citing Gene R. Nichol, *Is There A Law of Federal Courts?*, 96 W.VA. L. REV. 147 (1993)).

13. See *infra* notes 15-35 and accompanying text.

14. See *infra* notes 36-73 and accompanying text.

15. Republican Contract with America, Sept. 28, 1994, available in LEXIS, News Library, Hottop File. The first of three "core principles" of the contract states: "Accountability — The government is too big and spends too much, and Congress and unelected bureaucrats have become so entrenched to be unresponsive to the public they are supposed to serve. The GOP contract

Section nine of the contract, however, proposes that tort law should be nationalized,¹⁶ and sections two and four advocate the further federalization of crime.¹⁷ I mention this not necessarily as a critique of the Republican agenda but as evidence of the political realities underlying the federalization debate. While no one appears to favor the federalization of state law in the abstract,¹⁸ virtually every constituency supports federalization when it is consistent with their own substantive agenda. The pro-life and pro-choice forces, for example, may not have much in common; but it is quite clear that their approaches to federalism were to be the same if *Roe v. Wade*¹⁹ had been overturned. Both sides had indicated that the legislative battle over abortion was not going to be returned to the states, but rather was to be fought in the Congress.²⁰

Indeed the trend towards federalization is increasingly obvious to anybody perusing the pages of the United States Code.²¹ In 1992, as Judge Wallace notes, Congress made carjacking and willful failure to pay child support federal crimes.²² Both provisions, however, pale in comparison to the Crime Bill which added over 100 new federal criminal provisions including making everything from crossing state lines to engaging in spousal abuse or gang-related street crime a

restores accountability to government." *Id.*

16. *Id.* at § 9 (" 'Loser pays' laws, reasonable limits on punitive damages and reform of product liability laws [are needed] to stem the endless tide of litigation.").

17. *Id.* at § 2 ("An anti-crime package including stronger truth-in-sentencing, 'good faith' exclusionary rule exemptions, effective death penalty provisions, and cuts in social spending from this summer's 'crime' bill to fund prison construction and additional law enforcement to keep people secure in their neighborhoods and kids safe in their schools."); see also *id.* at § 4 (calling for the federalization of child pornography).

18. But see Rubin & Feeley, *supra* note 5, at 951 (arguing that the merits of federalism are overstated).

19. *Roe v. Wade*, 410 U.S. 113, 164-65 (1973) (holding that Texas criminal abortion statutes which prohibited abortion at any stage of the pregnancy, unless necessary to save the life of the mother, are unconstitutional).

20. See The Freedom of Choice Act of 1993, S. Rep. No. 42, 103rd Cong., 1st Sess.; see also Frank Reeves, *Abortion Offers Political Contrast; Senate Candidates Hold Different Views on Controversial Issue*, PITT. POST-GAZETTE, Oct. 21, 1994, at B1, available in LEXIS, News Library, Curnws File (reporting that Congressman Rick Santorum stated that if *Roe v. Wade* were overturned, he would favor a federal law prohibiting abortion).

21. It is not suggested that federalization is only a one way street. As the current Congress has evidenced, defederalization may occur. However, it seems fair to say that the overall trend is towards increased and not diminished federalization. Moreover, when defederalization does occur, it generally arises from objections to substantive policy and not from abstract federalism concerns.

22. See Wallace Letter, *supra* note 1, at 3 (citing Anti Car Theft Act of 1992, Pub. L. No. 102-519, 106 Stat. 3384; Child Support Recovery Act of 1992, Pub. L. No. 102-521, 106 Stat. 3403).

federal criminal offense.²³ Indeed, according to one study based upon information obtained from the Administrative Office of the United State Courts, there have been 202 new laws created by Congress in the last twenty years that have added to the workload of the federal courts.²⁴

The reasons behind this trend are not difficult to discern. To begin with, interest groups supporting particular measures are likely to prefer legislation at the national level. Professor Jonathan R. Macey, for example, has offered four cogent reasons to explain why this is so.²⁵ First, changing federal law requires less transaction costs than does state law. "It is simply less expensive to obtain passage of one federal statute than to obtain passage of fifty state statutes. . . ." ²⁶ Second, proceeding at the federal level is more efficient because even if statutes are passed at the state level the shadow of federal law cannot be avoided. "[P]olitical support must still be provided to federal regulators to induce them to forbear from later preempting the field. . . ." ²⁷ Third, federal law is "often considered a higher quality product than state law."²⁸ Fourth, "federal law is harder for adversely affected parties to avoid than is state law."²⁹ There is also another reason which I shall return to subsequently.³⁰ Federalization may be sought in order to emphasize the importance of the issue involved. An interest group may be concerned that without the imprimatur of federal law or federal jurisdiction, the matter of concern will not be perceived as being at the forefront of the national agenda.³¹

The trend towards federalization is also attributable to the fact

23. See App. B (citing Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 40221, 110401, & 150001, 108 Stat. 1796, 1926-31, 2014-15, & 2033-35).

24. Baker, *supra* note 13, at 39-48.

25. Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 271-73 (1990).

26. *Id.* at 271.

27. *Id.* at 271-72.

28. *Id.* at 272.

29. *Id.* at 272-73.

30. See *infra* notes 78-85 and accompanying text (discussing how interest groups also prefer legislation at the national level because such legislation often signifies that the substantive issue is of national concern).

31. See Judith Resnik, "Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. REV. 1682, 1749-50 (1991) (arguing that the unchallenged exclusion of "family concerns" from federal jurisdiction demonstrates the marginalization of women in the federal courts).

that the desire of interest groups to seek legislation at the national level is complemented by the interests of the federal officeholders from whom legislative action is sought. Again the reason is straightforward. Federal officeholders are in the business of incurring voter support.³² If the voters desire a particular type of legislative action, the federal officeholder will want to be seen as supporting and working for that legislative measure.³³

This, of course, does not mean that a federal politician may not be benefitted by extolling the virtues of federalism and advocating a return of power to the states. As the 1994 elections show, there can be a lot of mileage to be gained at times in arguing that the federal regulatory state should be downsized or that large federal programs such as national health legislation should be opposed. But that argument, if it is to be effective at all, is likely to succeed only when raised against federal regulatory law or when there is not a great deal of support for the substantive matter for which federalization is sought. In most other circumstances, particularly with respect to the federalization of criminal law, the federalism argument is likely to have appeal only in the abstract. It may win votes, for example, to claim that one is in favor of returning power to the state — it is seldom a vote winner to assert that one is not going to vote for a popular criminal measure on the grounds that it conflicts with a theoretical vision of federalism. Consider, for example, the recent Crime Bill's provision federalizing street crime by gang members.³⁴ Anyone who opposed this measure on federalism grounds would have to face the likely political specter that his vote would be characterized as being soft on gang violence. The result is that the decision to federalize can be boiled down to one simple formulation: whether a matter will or will not become federalized depends entirely upon its political attractiveness to the federal office holders.³⁵ And while a federal politician's reaction to proposed legislation may be influenced by federalism concerns, these concerns are likely to have only a secondary influence relative to her approval or disap-

32. Macey, *supra* note 25, at 265 nn.3-4 (citing George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971) and Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976)).

33. *Id.* For a discussion of the potential political restraints on the process that might work to limit federalization, see *infra* notes 55-73 and accompanying text.

34. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 15001, 108 Stat. 1796, 2033-35.

35. Macey, *supra* note 25, at 267.

proval on the substantive goals of the potential legislation.

II. THE RESTRAINTS ON FEDERALIZATION

A. Constitutional and Other Judicial Limitations

A review of the constitutional limits on the federalization of state law is necessarily succinct. In essence, there are few, if any, limits.³⁶ Since the early 1940's, the Court has consistently indicated that there are few, if any areas, that the federal government may not regulate.³⁷ True, there may be some limits on Congress' ability to impose affirmative obligations on states³⁸ or some limits with respect to the manner in which Congress chooses to impose regulatory schemes upon the states.³⁹ It may even be that the Court will expand on its decision in *United States v. Lopez*⁴⁰ to find significant constitutional limitation on the reach of Congressional power. But even though *Lopez* does hold that Congressional power to regulate private activity is not unbounded, the decision does not, as Professor Larry Kramer predicted, appear likely "to curtail [federal power] in

36. Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1486 (1994) (citing the Supreme Court's decision in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985)). For a criticism of the Court's approach in this area, see Martin H. Redish & Karen L. Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1, 4 (1987) (arguing that the text of the Commerce Clause imposes some limitation on federal power).

37. See *Perez v. United States*, 402 U.S. 146, 146-47 (1971) (holding that portion of Consumer Credit Protection Act prohibiting "loan sharking" activities is within Congress' power under the commerce clause to control activities effecting interstate commerce); *Katzenbach v. McClung*, 379 U.S. 294, 300-05 (1964) (holding that Congress was justified in finding that racial discrimination at restaurants had a direct effect on interstate commerce); *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 261-62 (1964) (holding that the public accommodations provisions of the Civil Rights Act of 1954 are valid under the commerce clause); *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (holding that the commerce power extends to those activities which have an aggregate effect on interstate commerce); *United States v. Darby*, 312 U.S. 100, 122 (1941) (sustaining the federal power to regulate the production of goods for commerce).

38. See, e.g., *New York v. United States*, 112 S. Ct. 2408, 2427-29 (1992) (holding the Low-Level Radioactive Waste Policy Act's "take title" provision, which required the states to take ownership of the wastes or follow Congressional regulations, was inconsistent with the Tenth Amendment, as Congress is only authorized to regulate interstate commerce directly and is not permitted to regulate state governments' regulation of interstate commerce).

39. In *South Dakota v. Dole*, 483 U.S. 203 (1987), for example, although the Court upheld Congress' attempt to coerce the state into adopting a 21 year drinking age requirement by conditioning the state's receipt of highway funds upon their adoption of the 21 year old limit, it nevertheless held that there might be some circumstances in which Congress' use of its spending power in this manner would be unconstitutional. *Id.* at 211.

40. 115 S. Ct. 1624 (1995) (holding that a federal law which prohibited the possession of guns within a certain distance of a school exceeded Congress' Commerce Clause power). *Lopez* was decided as this Article was going to print.

any significant way.”⁴¹

Of course, some revisionist doctrinal analysis might be offered in support of the proposition that the Court has not wholly abdicated federalization review. Arguably, whether intentional or not, the Court has occasionally slowed federalization through the use of rigid rules of statutory interpretation.⁴² For example, the various cases in which the Court has required “clear statements,” before it would interpret statutes in a way that imposed obligations on the states may also be seen as mechanisms aimed at slowing the federalization wave.⁴³ Similarly, the cases in which the Court has held that there must be an explicit indication that Congress intended to create a private right of action make more sense if viewed as an effort to minimize the creation of federal substantive law rather than as a doctrine addressing concerns of separation of powers.⁴⁴ And the holding in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*,⁴⁵ that federal jurisdiction would not be recognized over a state court’s remedy incorporating a federal standard,⁴⁶ makes more sense when viewed as an attempt to reduce the docket load of the federal courts than it does as an interpretation of 28 U.S.C. § 1331 “arising under” requirement.⁴⁷ Indeed, when pitted against a background concerned with the political inability of the federal government to limit its own power, a wide range of cases begin to develop a new

41. Kramer, *supra* note 36, at 1487 n.4. In response to *Lopez*, the Clinton administration, for example, immediately proposed a new statute prohibiting possession of guns near schools, adding only the element that the guns must be shown to have been moved in interstate commerce.

42. George D. Brown, *State Sovereignty Under the Burger Court — How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of Atascadero State Hospital v. Scanlon*, 74 GEO. L.J. 363, 390 (1985) (arguing that the “clear statement” rule allows the judiciary to be assured that Congress has considered the implications of subjecting a state to federal jurisdiction).

43. See *Gregory v. Ashcroft*, 501 U.S. 452, 455, 473 (1991) (holding that a clear statement would be required to construe a federal statute to state officials); *Pennsylvania v. Union Gas*, 491 U.S. 1, 13 (1989) (holding that Congress may abrogate a state’s immunity only by making its intention clear in the language of the statute); accord *Dellmuth v. Muth*, 491 U.S. 223 (1989).

44. See, e.g., *Transamerica Mortgage Advisers, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979) (stating that to decide whether a statute creates a cause of action, either expressly or by implication, the court must determine if Congress intended to create the private remedy asserted, and the inquiry must begin with the language of the statute itself).

45. 478 U.S. 804 (1986).

46. *Id.* at 817.

47. *Id.* at 805. The issue presented to the Court in *Merrell Dow* was “whether the incorporation of a federal standard in a state-law private action, when Congress has intended that there not be a federal private action for violations of that federal standard, makes the action one ‘arising under the Constitution, laws or treaties of the United States. . . .’” *Id.* (citing 28 U.S.C. § 1331).

coherency.⁴⁸

Nevertheless, even if all of these cases are added together, it is quite clear that the end result is little more than a holding action slowing the increase of the expansion of federal substantive law and federal jurisdiction only at the outer margins. Combatting the encroachment of federalization by creating various doctrines which amount to no more than possible annoyances is not an effective technique. First, their use has been relatively limited. For example, strict rules of statutory interpretation with the effect of limiting the scope of federal law, have not generally been used in the area of criminal law,⁴⁹ although this is the area where the most dramatic increases in federalization have taken place.⁵⁰ Second, the statutory interpretation method is disingenuous,⁵¹ and although judicial credibility, in an area that has produced cases such as *Mitchum v. Foster*,⁵² may not seem to be of much matter to the Justices, there is some value in coherent and consistent decisionmaking. Third, in terms of inhibiting federalization, the statutory interpretation rules are at best temporary devices. Congress may amend its statutes to more clearly indicate that it intends federalization to take place. In short, having held in its Commerce Clause, Spending Clause, and Tenth Amendment decisions that there was no substantial bar to the expansion of federal power at the expense of the states,⁵³ it seems half-hearted at best that the Court would try to reclaim ground on behalf of the states by the creation of "clear statement" rules and other such devices.⁵⁴

48. See, e.g., *Finley v. United States*, 490 U.S. 545, 548 (1989) (holding that Congress has the constitutional authority to define the jurisdiction of the lower federal courts); *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983) (holding that a district court's federal-question jurisdiction extends over "only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law").

49. NORMAN ABRAMS & SARA SUN BEALE, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 49 (1993).

50. See Baker, *supra* note 12, at 53.

51. Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 437 (1988).

52. 407 U.S. 225, 242-43 (1972) (construing § 1983 (the Civil Rights Act) to be an implied "express" exception to the Anti-injunction Act).

53. See *supra* notes 37-40 and accompanying text (discussing examples of these cases).

54. See, e.g., *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2633 (1992) (Scalia, J., dissenting) (explaining that "clear statement" rules, along with "plain statement" and "narrow construction" rules, are designed to ensure that "absent unambiguous evidence of Congress's intent, extraordinary constitutional powers are not invoked, or important constitutional protections eliminated, or seemingly inequitable doctrines applied").

B. The Political Restraints on Federalization

With the absence of meaningful judicial constraints on federalization, the only limitation is political. Indeed this is the positive theory offered by the Court in justifying its abdication of the judicial role in enforcing restrictions on Congressional power. Relying on the theory of process federalism, outlined by Professor Herbert Wechsler and Dean Jesse Choper,⁵⁵ the Court has justified its abdication of the judicial role by arguing that the states' interests are adequately protected through their representation in the processes of the federal government.⁵⁶ Because of this representation, the theory argues, additional judicial protection is not needed.⁵⁷

In a recent important article, Larry Kramer examined Wechsler's and Choper's theories of process federalism and found them lacking — at least in their explanation of how the processes of federalism actually work to protect state interests.⁵⁸ According to Kramer, the particular constitutional provisions cited as supporting the states' representation in the federal government no longer, if they ever did, provide the political protections for state interests that the process federalism theory suggests.⁵⁹

55. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 551 n.11 (1985) (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976)) (citing JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 175-84 (1980); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546-58 (1954)).

56. *Id.* at 550-51 ("It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress. The Framers thus gave the States a role in the selection both of the Executive and the Legislative Branches of the Federal Government.").

Garcia also relied on the argument that distinguishing between the appropriate spheres of federal and state regulation was "unsound in principle and unworkable in practice." *Id.*

57. *Id.* at 551-52.

58. Kramer, *supra* note 36, at 1503-14. He also addresses the theory of Professor Bruce LaPierre, which argues that there are two structural checks on federal overreaching. First, "states have the benefit of virtual representation from private interests because 'nationally determined substantive policy' also applies to private activity; second, that the federal government is constrained because it must lay out the 'financial and executive resources to administer and enforce national policy.'" *Id.* at 1512 (citing Bruce LaPierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U. L. Q. 779, 988 (1982)).

59. *Id.* at 1506-07.

These arrangements consist of the following: representation in Congress is allotted by states; qualifications to vote in federal elections are determined by state law; Representatives are elected in districts drawn by the states; each state has equal representation in the Senate through Senators chosen by the state's legislature; and presidential candidates must obtain a majority in the Electoral College.

On the other hand, as Kramer observes, it is still true that most law that directly effects the daily lives of individuals has not been federalized.⁶⁰ Kramer, then, rightly concludes that even if the particular mechanisms identified by Choper and Wechsler are ineffective or anachronistic, clearly "*something* is acting to perpetuate the role of the states."⁶¹ The question then is to determine what is protecting the states; and although Kramer purports to only begin the debate and not to offer definitive answers, he does offer some tentative suggestions.

Specifically, Kramer finds the protection of states' power to be found primarily in political parties.⁶² He argues that the mutual interdependence that political party affiliation creates between candidates for national office and candidates for local office furthers federalism policies.⁶³ According to Kramer, this interdependence forces the national office seeker to defer to the interest of his local counterpart in assuring that the federal government does not usurp state functions and responsibilities.⁶⁴

Kramer's observations are insightful and have powerful explanatory force. On the other hand, the restraints on federalization created by political parties, like the Court's clear statement rules, may

Id. at 1506 (citing Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546-58 (1954); JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 176-81 (1980)).

60. *Id.* at 1504. Kramer's observation is shared by Jesse Choper: "The fact is that state and local governments have flourished and expanded greatly during the sixty years that the Court has operated on 'the proposition that the political process alone sufficiently protects federalism and its underlying values.' " It would be a serious mistake to equate the enormous growth of the national government during this period with a diminution of state and local power. Jesse H. Choper, *Federalism and Judicial Review: An Update*, 21 HASTINGS CONST. L. Q. 577, 590 (1994).

61. Kramer, *supra* note 36, at 1521 (emphasis in original).

62. *Id.* at 1522-23. Kramer also finds a secondary role to the protection of state power in the structure of the administrative bureaucracy. *Id.* at 1543. He argues that "the interdependence of legislation and administration gives administrators a voice in the lawmaking process" and concludes that this relationship gives state officials a strong voice in the federal lawmaking process. *Id.* To Kramer, the mutual reliance that has developed between state and federal officials will serve to perpetuate the role of the states and also will impede any danger of over-federalization. *Id.* at 1544. The check on federalization of the bureaucratic interplay between state and federal administration, however, may be as extensive as Kramer suggests. While federal officials still need to depend on state governments, their dependence serves only a limited check on federal power. For example, under federal and state cooperative programs, the federal dependence of states is accomplished primarily through federal mandates which allows control to remain with federal officials. As such, the result is not a true interdependent relationship. More importantly, the governing law is federal, not state.

63. *Id.* at 1523.

64. *Id.*

ultimately work only as holding mechanisms, perhaps delaying, but certainly not substantially limiting, the growth in federalization. This is so for a number of reasons. First, as Larry Sabato notes:

there are considerable limitations on the influence American parties can exert on legislators under even the most favorable of conditions. Parties are certainly a more substantial source of cash and campaign technology than ever before, but they are not the only source by any means. While a legislator will not wish to offend any major benefactor, he or she will do so when necessary so long as other alternative support is available. Then, too, parties are hardly inclined at election time to discipline their incumbents — almost any incumbent, however uncooperative or obnoxious. Since the overriding objective is victory, the parties will normally choose the pragmatic course and aid any party candidate, rather than reward only some while punishing others and risking their defeat.⁶⁵

Second, while it is certainly true that political parties may exercise constraints on some federal office holders, other federal officials may not be all that beholden to their state party organization. The ability of wealthy and/or celebrity candidates, for example, to attract their party's nomination for political office without having gone through normal political routes may diminish the dependency that Kramer discusses.⁶⁶

Third and more significantly, Kramer's political interdependence argument has validity only in those situations where members of the same party hold both state and federal office at the same time. For example, while a federal officeholder may defer to local and state officeholders by not supporting the federalization of a particular matter when her party is in power in her home state, she has no similar motivation when her party is not in power in the state. For example, a Republican Congressperson working for tort reform may

65. LARRY J. SABATO, *THE PARTY'S JUST BEGUN* 100 (1980).

66. Kramer argues that even the most independent candidate must rely at least in part on party structure to provide the necessary resources for running for office such as computerized data banks, etc. Kramer, *supra* note 36, at 1535. Even so, the tie in between the provision of campaign resources and a quid pro quo on federalization issues is not immediately clear. Perhaps a candidate may feel some obligations to party organization leaders who have provided campaign resources. But party leaders are not always the same as state officeholders and obligation to one does not mean obligation to another. And it has been my experience at least that party leaders are often only tangentially interested in substantive legislative enactment. Their allegiance, is to those who win. See SABATO, *supra* note 65, at 100.

feel obligated to oppose national tort reform legislation when Republican office holders are seeking reform at the state level. On the other hand, if the Democrats are in control of the state government and are not pursuing policies consistent with the Republican Congressperson's agenda she would likely feel no constraints. Indeed, even if the Democrats are pursuing similar goals, the Republican Congressperson may want to proceed at the national level, if only to assure that she, and possibly her party, earn the political credit. For these reasons, local elected Republicans within the Congressperson's state are likely to support her efforts directed at federalization.

Fourth, the political party theory, like Wechsler's and Choper's process federalism does not recognize that the erosion of state power and responsibility is more gradual than sudden. For example, even if a federal office holder feels indebted to his state counterparts and for that reason chooses not to support a federalizing provision, the likely result is that the federal office holder will compromise; that is, the federal office holder may agree that some matters of state law become federalized while other matters remain within state governance. Indeed, this is the likely scenario that just occurred in the Crime Bill.⁶⁷ While some of the most radical provisions federalizing state law were rejected, the eventual result was that significant erosion of traditional areas of state power took place.⁶⁸

Fifth, there are many federalization issues, particularly those involving the criminal law, where any mutual interdependence that state and federal office holders may have is unlikely to be of restraining influence at all. Carjacking is one example. State legislators do not have any particular reason to oppose this crime being made a federal as well as a state offense. Indeed they all may view it as a positive step, in lessening both the political demands being levied on them to address the problem and the resource demands in investigating, prosecuting, and trying the case.⁶⁹ Rather the groups likely to oppose the federalizing of carjacking are federal judges concerned with docket problems,⁷⁰ the criminal defense bar concerned with prosecutorial avenues around double jeopardy protec-

67. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

68. See App. B (citing new offenses and changes included in the Violent Crime Control and Law Enforcement Act of 1994).

69. Schwarzer & Wheeler, *supra* note 3, at 670-71.

70. *Id.* at 670.

tions,⁷¹ and theoreticians concerned that too much state law is being federalized. None of these groups (although the federal judiciary has certainly tried) have the political clout to represent the states as states in the federal political process.

This leads to a final and important point. The weakness with any theory that asserts that federalism concerns are protected through the political process is that the political actors ostensibly charged with defending state interests may not always be concerned with defending the underlying values that federalism represents.⁷² The interest in protecting state power (and its accordant federalism values) is waivable, under the political process theories, by those who have little or no interest in federalism's protections.⁷³ In short, while federalization of state law may not be wholly free from political checks, the political checks that do exist do not go very far in assuring that federalism concerns are adequately protected.

III. POLITICAL CULTURE AND THE RELATIONSHIP OF THE IMPORTANCE OF A MATTER AND WHETHER IT SHOULD BE FEDERALIZED

Kramer, however, is undoubtedly correct in asserting that the political limitations on federalization are essentially functions of "political culture," or the "shared understandings of political actors."⁷⁴

71. See Akhil Reed Amar & Jonathon L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 2 (1995) (arguing that dual enforcement allows "federal and state government acting in tandem, [to] do what neither government can do alone—prosecute an ordinary citizen twice for the same offense").

72. The primary values underlying federalism have been identified as preserving states as laboratories for legislative experimentation, the role of the states as decentralized competitors, the states as guardians of individual rights, and the role the states serve as a check on the federal government. Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341. While, in the abstract these values may appeal to the political sensibilities of some federal officials, it is difficult to discern any direct benefit that federal officials receive as *federal officeholders* in enforcing federalism values. Perhaps the best argument in this respect is offered by Akhil R. Amar, who argues their very structure of national offices creates strong political incentives for "national office-holders to attend to state and local concern" because the states may serve as the citizens' measuring stick in evaluating federal activity. Amar & Marcus, *supra* note 71, at 2.

73. In contrast, note that the political culture does not effect the constitutional principle of separation of powers; this structure is not waivable. See *I.N.S. v. Chadha*, 462 U.S. 919, 951-59 (1983) (holding the section of the Immigration and Nationality Act which authorized one house to veto the decision of the executive branch was unconstitutional based on separation of powers concerns); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585-89 (1952) (holding that the issuance of a seizure order exceeded the constitutional bounds of the President's authority).

74. Kramer, *supra* note 36, at 1505.

As he explains, the means by which political power is to be allocated between the states and the federal government will primarily depend upon the "customs, ideas, beliefs, experiences, and practices of the people involved."⁷⁵

The way in which the political culture has changed, however, does not bode well for those opposing federalization. For example, Professor Wechsler, writing in 1954, argued that states were protected because the political tradition was such that federal intervention was seen as exceptional and justified only by special necessity.⁷⁶ The recognition that most law should remain in the province of the state, moreover was not simply a product of the political culture of the United States Congress. It was also reflected in a number of the judicial decisions of the United States Supreme Court which limited federal jurisdiction on grounds that certain matters should not be removed from state oversight. Examples of this included probate,⁷⁷ domestic relations,⁷⁸ and some matters involving property rights.⁷⁹

The political notion that federal involvement is exceptional, however, is no longer the norm. As Kramer argues, the belief that "our constitutional tradition requires [Congress] to have special justification before displacing state law . . . is not an important part of the political scene in Washington today."⁸⁰ The result is that there are currently few areas, if any, which the political culture treats as outside the range of appropriate federal governance.⁸¹

Perhaps more significant for federalization concerns is not the tenet of the political culture that has been abandoned but the one that has risen in its stead. The apparent new principle of the politi-

75. *Id.* at 1551.

76. Wechsler, *supra* note 55, at 544.

77. Byers v. McAuley, 149 U.S. 608, 615-20 (1893) (stating that since a probate administrator appointed by a state court is an officer of that court, property possession cannot subsequently be disturbed by a federal court without invading the state court's jurisdiction).

78. See Barber v. Barber, 323 U.S. 77, 81 (1944) (establishing by dictum the domestic relations exception to federal jurisdiction).

79. See, e.g., Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 30-31 (1959) (holding that federal abstention is appropriate when there is an unsettled question of state law in an area of particular local concern, such as eminent domain); see also Shoshone Mining Co. v. Rutter, 177 U.S. 505, 513 (1900) (holding that a federal remedy affecting property claims does not give rise to "arising under" jurisdiction).

80. Kramer, *supra* note 36, at 1505.

81. Larry Kramer argues that other facets of the political culture continue to inhibit federalization. These include the fact that many federal officeholders come from state government backgrounds, that state and local offices exert powerful lobbying influence on the federal government, and that both bureaucratic and grass-roots forces continue to demand that significant powers be exerted at the local level. *Id.* at 1551-54.

cal culture's approach to federalization is that candidacy for federal law and federal jurisdiction should be assessed by the "importance" of the substantive issue in question. This principle was originally offered, interestingly enough, as an effort to inhibit federalization. Justice Rehnquist, for example, has used the argument that the federal courts are to be "reserved for issues where important national issues predominate,"⁸² as an argument for limiting federal jurisdiction. But while the genesis of the importance notion may have been an attempt to limit federalization, the importance principle may ultimately work more as a catalyst for the expansion of federal power than as a limitation.

First, if importance is interpreted to mean important to most people, then we are only at the tip of the federalization iceberg.⁸³ While federalization has begun to encroach upon traditional matters of state governance, it is still true that the law that most profoundly affects the daily lives of the citizens has not yet been removed from the province of the states. In the civil area, this includes property, probate, domestic relations, contract, and tort law;⁸⁴ in the criminal area it includes murder, rape, and felonious assault.⁸⁵ A political culture stressing the appropriateness of federalizing what is "important" is likely to federalize a number of matters in these areas — particularly in the criminal law.⁸⁶

Second, the move to the importance of the substantive issue as being pivotal in whether or not to federalize, increases the stakes that many constituencies have in federalization because it essentially asserts that failure to federalize is equivalent to a statement that the matter for which federalization is sought is not of national concern. Indeed, this is the thrust of Professor Judith Resnik's article "*Naturally*" *Without Gender: Women, Jurisdiction and the Federal Courts*.⁸⁷ Resnik objects to the federal courts' systematic exclusion of matters that are of particular concern to women, on the

82. William H. Rehnquist, Chief Justice's 1991 Year-End Report on the Federal Judiciary, 24 THE THIRD BRANCH 1, 2 (1992).

83. Of course, it could be argued that importance is not intended to be interpreted in this manner. Certainly, it does not appear to be the meaning that Justice Rehnquist intended. On the other hand, given the realities of the political culture, it is unlikely that an interpretation of importance as not important to the common citizenry but important to those setting the national agenda in Washington is likely to fly in the national political debate.

84. See Kramer, *supra* note 36, at 1504.

85. *Id.*

86. Baker, *supra* note 12, at 52-53.

87. Resnik, *supra* note 31.

grounds that these exclusions are, in essence, statements that women "are assumed not to be related to the national issues to which the federal judiciary is to devote its interest."⁸⁸

It is hard to dispute Resnik on this point. If the federal courts are to be "reserved for issues where important national issues predominate,"⁸⁹ then it follows that opposing the federalization of crimes of violence against women and abstaining from domestic relations cases are in effect political statements that gender matters are not at the heart of the national agenda.

The question, however, is whether it make sense to interpret federalization and federal jurisdiction in this manner. The protection of individuals from violence, for example, is undoubtedly a matter of the highest importance, but once federalization and federal jurisdiction is treated as a political statement, the fact that murder is not a federal crime begins to suggest that the national commitment to ending violent death is only half-hearted. Or to again reinvoke the Crime Bill, if the political culture is such that important issues are to be federalized, then a national commitment against gang violence requires that street crime by gangs should be treated as a federal offense. The point, I hope is clear: *The importance rationale is only an invitation to, and not a limitation on, federalization.*

The final deficiency in the importance rationale is its potential damaging effect on state courts. The critical significance of state courts to the effective administration of justice in this society can not be overstated. Quantitatively, "an estimated ninety-five to ninety-nine percent of all litigation in the United States occurs in state courts."⁹⁰ Qualitatively the state courts still remain the primary forums where individuals litigate the issues that affect them most. Logically, it would seem that the protection of the resources and the abilities of the state courts to effectively function should be the top judicial priority; particularly given the near crisis conditions currently surrounding many state courts,⁹¹ and the reality that

88. Resnik argues that matters of concern to women are excluded through such devices as the domestic relations abstention doctrine and the federal judiciary's institutional opposition to the federalizing of crimes involving violence against women. *Id.* at 1749.

89. Rehnquist, *supra* note 82, at 76.

90. Baker, *supra* note 12, at 11 (citing FRANK M. COFFIN, ON APPEAL-COURTS, LAWYERING AND JUDGING 56 (1994) (reporting that state cases occupy 99% of the field at the trial level); Vincent L. McKusick, *Combining Resources*, NAT'L L.J., Nov. 19, 1990, at 13 (stating that over 95% of all litigation in this country occurs in state courts).

91. See Baker, *supra* note 12, at 15 (citing COFFIN, *supra* note 90, at 62-63).

demographics and political forces are likely to cause the condition of state courts to further worsen in the future. In the words of Professor Thomas E. Baker, the "future of the state courts will be 'more or less' the same as the present. . . 'more' cases and 'less' resources."⁹²

A political culture that treats the federal courts as the premiere guardians of important rights and thereby relegates the state courts to essentially secondary status, can only exacerbate the state courts' resource concerns. When the state courts are no longer viewed as the primary judicial system for most individuals, it follows that public commitment to appropriate levels of funding may also drop. Certainly a state politician who has seen his federal counterpart receive all the accolades for pushing a particular measure may feel reluctant to fund more resources for the state courts so that the state courts can clear up the federal courts' unfinished business. It may also be true that the quality of those serving on the bench is likely to suffer as less pay, poorer working conditions, and diminished prestige will make serving on the state bench less attractive.

The benefit of federalizing particular issues in short, may be that it assures that a matter is perceived as having national significance. The detriment, however, may be to assure that the vast majority of cases which have to remain in state courts because of capacity issues alone, will not receive adequate judicial treatment. The protection of important rights, then, might be better pursued by advocating improvement of the state courts rather than seeking the gloss of federalization. The point, therefore, is simple: the rhetoric of importance should be removed from the political culture in deciding issues of federalization and federal jurisdiction.⁹³

92. *Id.* at 10.

93. Importantly, recent leading studies in this area do not refer to importance as a criteria in determining whether or not to federalize. See Chemerinsky & Kramer, *supra* note 3, at 77-94 (arguing that there are some areas where federal jurisdiction is essential, and other areas where the state courts could play a greater role); Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769, 1795 (1992) (suggesting that the criteria for making a reduction in federal dockets should be based on a general assessment of how well certain kinds of cases would be served under federal jurisdiction); COMMITTEE ON LONG RANGE PLANNING, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS, JUDICIAL CONFERENCE OF THE UNITED STATES 19-32 (Nov. 1994) (suggesting that federal jurisdiction should be determined by such factors as effect on the federal government, involvement of multiple states, relation to federal interests, relation to federal constitution or statutes).

CONCLUSION

As long as the rhetoric is maintained that the most important problems facing this society should be nationalized, and as long as the economics of public choice is such that it is easier to promote substantive policies at the federal rather than the state level, the push for federalization is not likely to subside. While there may be a brief downturn in the federalization trend given the announced commitment of the new Republican Congress, there is little likelihood that a defederalization momentum is likely to be sustained even if it does occur as long as federalization remains equated with the importance of the substantive issue involved.

APPENDIX A

United States Court of Appeals

For the Ninth Circuit

United States Courthouse

San Diego, California 92189

Chambers of
J. Clifford Wallace
Chief Judge

March 29, 1993

The Honorable William H. Rehnquist
Chief Justice of the United States
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

The Honorable Janet Reno
Attorney General of the United States
Department of Justice
Tenth and Constitution Avenue, N.W.
Washington, D.C. 20530

The Honorable Joseph R. Biden, Jr.
United States Senator
SR-221 Russell Senate Office Building
Washington, D.C. 20510-0802

The Honorable Jack Brooks
United States Congress
2449 Rayburn House Office Building
Washington, D.C. 20515-4309

Dear Mr. Chief Justice, General Reno, Senator Biden, and
Congressman Brooks:

Future historians of the federal courts will
likely look to the 1990's as a time when the
nation had to confront, and decide, core
questions about the federal courts and their
role in our polity.

Chief Justice William H. Rehnquist, Welcoming Remarks Before the
1993 National Workshop for Judges of the U.S. Courts of Appeals
(Feb. 8, 1993).

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I write to all three branches of government because the problem I describe, I believe, can be alleviated only by three-branch cooperation. My recommendation is modest -- but first the problem.

By all accounts, the federal judiciary is fast approaching a crisis point. In the past 10 years, we have witnessed an ever-rising tide of filings in the appellate, district, and bankruptcy courts.

The numbers are startling. Between 1981 and 1991, the total number of cases filed in the United States Courts of Appeals increased by nearly 60 percent. See 1991 Annual Report of the Director of the Administrative Office of the United States Courts, Table 1, at 81. Over the same 10-year period, the total number of criminal cases filed in the federal district courts increased by nearly 50 percent. See id. Table 8, at 90. Drug-related cases, which constitute a large portion of our appellate docket, more than tripled. See id. Civil cases are often placed on the back burner, in some jurisdictions, as the judges try to cope with the flood of drug and gun cases. Nor is the picture brighter for bankruptcy courts; between 1981 and 1991, total filings more than doubled. See id. Table 13, at 104.

The dramatic growth in the federal caseload, especially before the Courts of Appeals, has serious implications for the federal judiciary. Obviously, clogged dockets have resulted in increased delay and expense. Some of the negative consequences are more subtle, yet just as real. As we are called upon to resolve more and more cases, our ability to focus attention on any one case must necessarily diminish, and the quality of our work will suffer. In addition, we have been forced to adopt, and will continue to adopt, shortcuts to cope with the rising volume: we hear fewer oral arguments, publish fewer opinions, and rely more heavily on law clerks and staff attorneys. The heavy volume of cases thus threatens the ability of the federal judiciary to give each case the attention and care it deserves.

The principal cause of this growth in our dockets is no secret. Traditionally, the federal courts heard a very narrow range of cases. Over the past several years, however, Congress has enacted a host of new federal criminal statutes and civil claims. In many areas, most notably the war on drugs, Congress

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has restated state law into federal law. As a result, cases that at one time would have been handled by state courts are now in the federal courts.

Will this increased federalization of the law abate? Last year, Congress made carjacking and the willful failure to pay child-support obligations federal crimes. See Anti Car Theft Act of 1992, Pub. L. No. 102-519, 106 Stat. 3384 (1992); Child Support Recovery Act of 1992, Pub. L. No. 102-521, 106 Stat. 3403 (1992). Congress also created a civil claim in federal court for victims of international terrorism. See Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506, 4521-24 (1992). This year, Congress will probably consider the proposed Violence Against Women Act and the Crime Bill.

I do not wish to denigrate either the merit or the importance of any of this legislation. Nor do I suggest that Congress should not consider these issues -- formulation of such policies is the province of the political branches. My position, rather, is that our country has reached a point where it can no longer ignore the cost the creation of additional rights and remedies imposes on the federal system. I realize that national policy reasons may exist which deem it important to declare that the federal courts should assume jurisdiction over cases traditionally handled by the states. Given the increasingly national scope of many of the problems facing our society, our substantive law cannot always be divided neatly into the inherently federal and the inherently local. But clearly, the federal government alone cannot solve every problem confronting our nation. The fact that a particular area of the law could be handled in federal court does not necessarily mean that it should be.

Up until now, the federal courts have handled less than two percent of our country's litigation. The federal courts are small and specialized bodies, dedicated to dealing with unique federal problems. State courts, with fully qualified judges, are prepared to handle nearly all of the total cases filed. Thus, the goal should be to determine which of the cases that have national implications should, and must, be heard by the federal courts, taking into account both the importance of the federal interest at stake and the impact on the federal court system.

Assuming this analysis to be acceptable, the question then is, what should be done? The traditional response has been

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for Congress to create more federal judgeships. Although the federal court system could probably absorb additional judges, can continued horizontal expansion solve the problem in the future? See Wallace, Working Paper -- Future of the Judiciary, 94 F.R.D. 225, 227-28 (1981). The federal courts are unique because they state the federal law, and they must be small enough to do so. At some point -- and I am not sure what that point is -- the confusion and conflict between and among circuits could threaten to overwhelm whatever efficiency gains might otherwise obtain from creating additional judgeships. Litigants would not discern federal principles, but would hear a tower of Babel.

Recently, two of my fellow judges offered their own solutions for alleviating the pressures on the federal court system. My colleague Stephen Reinhardt boldly suggests that the size of the federal courts of appeals be doubled. See Reinhardt, Too Few Judges, Too Many Cases, A.B.A. Journal, Jan. 1993, at 52, 53. His proposal is not based on numerical studies or projections but rather on his own "practical knowledge and experience." Id.

I fear that his plan will do little to alleviate the long-term problems facing our court system. It is the band-aid approach which bothers me. Judge Reinhardt does not offer any rational way of determining how many judges our system needs or should have, either now or in the future. Gut feelings should not guide so crucial a policy choice. Moreover, Judge Reinhardt focuses on only half the equation: the number of federal judges. He ignores the equally important problem of too much law. I realize that he did not intend to address the increased volume, but should not a plan analyze both aspects? Without some change in the present trend toward federalizing more of what is now state law, there is no reason to believe that his proposal to double the number of appellate judgeships today will not lead to another doubling several years down the road, followed by another doubling after that.

Judge Jon O. Newman of the Second Circuit takes a different tack. He asserts that the real threat to the federal court system is the unrestrained growth in the number of judges. He argues that Congress should hold the number of authorized Article III judgeships -- both district and appellate -- at 1,000, a number he believes is the limit for an effective federal judiciary. See Newman, 1,000 Judges -- The Limit for an Effective

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Federal Judiciary, *Judicature*, Dec.-Jan. 1993, at 187. In an effort to control the caseload flowing through the federal system, Judge Newman would eliminate diversity jurisdiction and would de-federalize several areas of federal substantive law. *Id.* at 194. Although I agree with Judge Newman that there is some limit to the number of Article III judges our court system can sustain, I do not believe we can simply set an arbitrary cut-off, such as 1,000 judges. Judge Newman also rightfully points out that many federal crimes could probably be prosecuted effectively in state courts. He fails, however, to provide a mechanism for determining which cases should be heard by federal courts. In my view, the appropriate number of judges can be selected only after considering both the needs of the judiciary and the policy demands of Congress and the public.

I suggest that our present ad hoc approach to the problems facing the federal courts is counterproductive. Too often, the federalization of crime and the creation of new federal claims are treated as somehow independent of the crisis facing the federal courts. The answer, also too often, is simply to add more judges, although in an amount that always seems to lag behind the number needed to process the ever-growing volume of cases. Thus, we create new federal law now and only worry about the consequences for our federal court system later. I believe that focus must first be on two basic principle: what does our country want and need from our federal court system, and how can it be obtained?

The only way to achieve long-term solutions is to develop a procedure to evaluate new federal law and its impact on the federal court system. The first step is to develop the mission of the federal courts. What types of issues should be handled by the federal courts? Congress's increasing tendency to federalize areas of the law that were once within the domain of the state courts should force the answering of the question: are federal courts the proper forum to right all of the ills facing society today? It is not enough to recognize that a problem -- whether it be drug trafficking or domestic violence -- is important, and at times even a national issue. That often cannot be denied. Should we not also ask: can the state courts handle these cases adequately? In other words, we must somehow develop a method to prioritize the types of cases that are to come before the federal courts.

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Next, consideration should be given to the ability of the federal court system to carry out that mission. What is our institutional capacity to adjudicate the volume of cases before us, now and in the future? We must analyze our ability to evaluate the legal and factual issues before us, the efficiency with which we can process our caseload, and the resultant quality of our decisions. Is there a maximum volume of work that should be assigned to the federal judiciary? Is there some upper limit to the number of judges our system can sustain before confusion and conflict overwhelm the judicial enterprise? Assuming, as I think we must, that there is some ceiling on our ability to handle an increasingly complex and heavy caseload, how can it be determined?

I suggest that the mission of the federal courts must be developed jointly by the three branches of our government. Members of the political branches focus primarily on the political costs and benefits of enacting a given piece of legislation. The impact of that law on the efficient administration of the courts is ordinarily considered as a peripheral issue, if it is considered at all. As judges, we are all too aware of the pressures placed on us by the growing volume of federal law. Because of the nature of our role in the constitutional scheme, however, we must stand separate from the political process. Sorting out essential federal rights and obligations from all of the important public issues involves hard political choices. Thus, it is only by analyzing the problem together that we can hope to achieve a rational, long-term solution.

I therefore come to my proposal: the creation of a national conference, with representatives from all three branches of government, to study the problems facing the federal court system. The conference would produce a long-range statement about the mission of the federal courts.

The end result of this process would be to establish practical guidelines to channel decisions regarding the creation of new federal law and the reform of the federal court system. For example, if Congress wishes to pass a new law federalizing some aspect of state law, it would first ask how this new law fits within the mission of the federal courts, taking into account the institutional constraints at work. Once the mission of the courts has been developed, the number of judges needed to carry it out can be determined. In this way, the size and structure of the

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judiciary would be determined not by arbitrary limits or requests, but by application of enunciated principles derived from the adopted mission of the federal courts.

When confronted by this issue, the subcommittee of the Federal Courts Study Committee, formed to analyze the role of the federal courts and their relations to the states, concluded that it "should not try to draft a detailed blueprint for the proper scope of federal jurisdiction." 1 Federal Courts Study Committee, Working Papers 103 (1990). The subcommittee concluded:

Any model identifying the "proper" role of the federal courts thus has inescapable and far-reaching substantive implications, and as a result an unavoidable political dimension. The Federal Court Study Committee is not a representative body and its membership does not reflect many of the relevant interests. Defining the role of the federal courts simply is not the kind of task that Congress can delegate to an outside body of experts; it is not a scientific inquiry.

Id. at 105. That is why I first proposed a three-branch commission to study the future of the judiciary, rather than a study housed in one branch. See Working Paper, supra, at 235-36. The creation of the committee from one branch prevented the type of analysis I -- then and now -- propose. A three-branch conference would be an adequate and effective vehicle for the purpose of establishing a mission of the federal courts.

But if the conference does not result in a statute, and is no more specific than a mission, how will it help? Establishing common ground among the branches on the mission of the federal judiciary will not solve problems. What it will do is sharpen the issue for rational resolution. Too often the debate is over the importance of the issue under consideration and whether all judges are working hard enough. As outlined above, a mission statement would allow debate over whether this is one of those unique areas where federal rather than state courts should take responsibility. Another necessary ingredient would be whether adding the required judge power is consistent with the uniqueness of the federal judiciary.

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A three-branch conference is worth trying and worth the investment of our best efforts. It could provide a new watershed to maintaining the effectiveness of the federal judiciary in carrying out its role in the administration of justice in our country.

Very truly yours,


G. Clifford Wallace
Chief Judge

JCW:gpl

cc: The Honorable Howell T. Heflin
The Honorable William J. Hughes

APPENDIX B

Summary of new offenses in the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

DEATH PENALTY

Murder committed in a federal correctional institution by a federal prisoner serving a term of life imprisonment.

(§ 60005)

Drive-by shooting in relation to a major drug offense.

(§ 60008)

Foreign murder of a United States national. (§ 60009)

Murder by an escaped federal prisoner serving a term of life imprisonment. (§ 60012)

Murder of a State or local officer assisting a federal criminal investigation. (§ 60015)

Sexual abuse within the special maritime and territorial jurisdiction of the United States or in a Federal prison resulting in death.

(§ 60010)

Sexual exploitation of children involving interstate or foreign commerce resulting in death. (§ 60011)

Murder or attempted murder involving the use of a firearm or other dangerous weapon during an attack in a federal facility. (§ 60014)

Murder or attempted murder in retaliation against a witness, victim, or an informant involving federal proceedings.

(§ 60017)

Taking by force and violence or intimidation a motor vehicle that has moved in interstate or foreign commerce with intent to cause death or serious bodily harm (i.e., carjacking).

(§ 60003)

NEW OFFENSES TO IMPLEMENT UNITED STATES TREATY OBLIGATIONS INVOLVING CRIMES AT INTERNATIONAL AIRPORTS, AND MARITIME VESSELS AND PLATFORMS

Seizing a ship by force or threat. (§ 60019)

Performing an act of violence on a ship if the act may endanger its safe navigation. (§ 60019)

Destroying or damaging a ship or its cargo if the act may endanger the ship's safe navigation, (§ 60019)

Placing a device or substance on a ship which is likely to destroy it or endanger its safe navigation (§ 60019)

Destroying maritime navigational facilities or interfering with their operation if doing so may endanger the safe navigation of a ship. (§ 60019)

Knowingly communicating false information and thereby endangering the safe navigation of a ship. (§ 60019)

Injuring or killing any person in connection with a crime of violence against maritime navigation. (§ 60019)

Threatening to commit an act of violence on a ship or to destroy a ship or navigational facilities, if the threatened act may endanger the safe navigation of a ship. (§ 60019)

Seizing a fixed maritime platform by force or threat. (§ 60019)

Performing an act of violence on a fixed maritime platform if the act may endanger its safety. (§ 60019)

Destroying or damaging a fixed maritime platform if the damage may endanger its safety. (§ 60019)

Placing a device or substance on a fixed maritime platform which is likely to destroy it or endanger its safety. (§ 60019)

Killing or injuring any person in connection with a crime of violence against a fixed maritime platform. (§ 60019)

Threatening to perform an act of violence on or destroy or damage a fixed maritime platform if the threatened act may endanger the safety of the fixed maritime platform. (§ 60019)

Performing an act of violence that causes serious bodily injury or death of a person at an international airport. (§ 60021)

Destroying or damaging the facilities of an international airport if the act may endanger safety at that airport. (§ 60021)

Using a weapon of mass destruction against a national of the United States outside the United States. (§ 60023)

Using a weapon of mass destruction against any person within the United States. (§ 60023)

Using a weapon of mass destruction against property of the United States. (§ 60023)

TERRORISM

Counterfeiting United States currency outside the United States.

(§ 120003)

Providing material support to terrorists. (§ 120005)

Terrorist offenses by or against a national of the United States on a foreign vessel having a scheduled arrival or departure from the United States. (§ 120002)

ASSAULT WEAPONS BAN AND FIREARMS

Manufacture, transfer, or possession of a semiautomatic assault weapon. (§ 110102)

Use or possession of a semiautomatic assault weapon during a crime of violence or drug trafficking offense. (§ 110102)

Transfer or possession of a large capacity ammunition feeding device. (§ 110103)

Smuggling firearms into the United States in aid of drug trafficking. (§ 110503)

Theft of a firearm moving as, or which has moved in, interstate or foreign commerce. (§ 110504)

Theft of explosives moving as, or which have moved in, interstate or foreign commerce. (§ 110504)

Possession by prohibited persons of an explosive which has moved in interstate or foreign commerce. (§ 110508)

Possession or sale of stolen firearms moving as, or which have moved in, interstate or foreign commerce. (§ 110511)

Possession or sale of stolen ammunition moving as, or which has moved in, interstate or foreign commerce. (§ 110511)

Receipt of firearms within a State by a non-resident of that State. (§ 110514)

Theft of firearms from a licensee. (§ 110515)

Theft of explosives from a licensee. (§ 110515)

Disposing of explosives to prohibited persons. (§ 110516)

Interstate travel to acquire a firearm with intent to engage illegally in the business of dealing in firearms. (§ 110517)

Knowingly making a false statement by an applicant for a firearms license that the applicant's business is not prohibited under State or local law. (§ 110302)

Knowingly making a false statement by a firearms licensee as to the theft or loss of any firearm. (§ 110302)

YOUTH HANDGUN SAFETY

Possession of a handgun or handgun ammunition by a juvenile. (§ 110201)

Transfer of a handgun or handgun ammunition to a juvenile.

(§ 110201)

STREET GANG CRIMES

Commission of a crime of violence or drug felony by a member of a criminal street gang, with knowledge that the gang's members engaged in a continuing series of such crimes or with intent to promote the gang's activities or to maintain or increase the participant's position in such a gang, and if the defendant has a prior conviction for one of several specified offenses. (§ 150001)

DRUG TRAFFICKING

Using a minor to distribute drugs at or near a school or at other protected location. (§ 140006)

Using a minor to assist in avoiding detention or apprehension for drug dealing. (§ 140006)

Placing a written advertisement in a publication for the purpose of seeking illegally to receive or distribute a schedule I controlled substance. (§ 90106)

Distributing or manufacturing a controlled substance in or near public housing. (§ 320107)

Distributing or possessing with intent to distribute a controlled substance in or within 1,000 feet of a truck stop or safety rest area. (§ 180201)

VIOLENCE AGAINST WOMEN

Traveling interstate or entering or leaving Indian country with intent to injure or intimidate one's spouse or intimate partner and thereafter committing a crime of violence that causes bodily injury to such spouse or intimate partner. (§ 40221)

Coercing or causing by fraud one's spouse or intimate partner to travel interstate or enter or leave Indian country and thereafter committing a crime of violence against that person which causes bodily injury. (§ 40221)

Traveling interstate or entering or leaving Indian country with intent to engage in conduct that violates a protection order protecting the victim against credible threats of violence, harassment, or bodily injury, and thereafter engaging in the prohibited conduct (irrespective of whether it occurs in the jurisdiction in which the order was issued). (§ 40221)

Coercing or causing by fraud a spouse or intimate partner to travel interstate or enter or leave Indian Country if injury in violation of a valid protection order results. (§ 40221)

DOMESTIC ABUSERS AND FIREARMS

Possession of a firearm by a person subject to an order restraining the person from harassing, stalking or threatening an intimate partner or such partner's child, or engaging in conduct that would place the intimate partner in reasonable fear of bodily injury to the partner or his or her child. (§ 110401)

Transfer of a firearm to a person subject to an order restraining the person from harassing, stalking, or threatening an intimate partner or such partner's child, or engaging in conduct that would place the intimate partner in reasonable fear of bodily injury to the partner or his or her child. (§ 110401)

CHILD PROTECTION

Assault within the special maritime and territorial jurisdiction of the United States resulting in substantial bodily injury to a child less than 16 years of age. (§ 170201)

Kidnapping of a child by a biological parent whose parental rights have been terminated by court order. (§ 320924)

Sexual abuse within the special maritime and territorial jurisdiction of the United States through certain acts of touching the genitalia of a young victim. (§ 40502)

CHILD SEX TOURISM

Traveling in interstate commerce, or in foreign commerce by a United States citizen or permanent resident, with intent to commit a sexual act with a minor that would be an offense if committed within the special maritime and territorial jurisdiction, regardless of whether the act would be an offense under the law of the state or country where it occurs. (§ 160001)

CHILD PORNOGRAPHY

Using a minor outside the United States to produce child pornography (*i.e.*, visual depictions of sexually explicit conduct) with intent that it be imported into this country. (§ 160001)

Possessing or distributing child pornography outside the United States with intent that it be imported into this country. (§ 160001)

TELEMARKETING FRAUD

Engaging in telemarketing fraud (*i.e.*, the conduct by fraud of a plan, program, promotion, or campaign using interstate telephone calls to induce the purchase of goods or services or participation in a contest or sweepstakes). (§ 250002)

EXPANDED JURISDICTION FOR FRAUD OFFENSES

Engaging in a scheme to defraud, involving the depositing of any matter to be delivered by a private or commercial interstate carrier. (§ 250006)

CREDIT CARD FRAUD

Fraudulently using credit cards issued to another person to receive more than \$1,000 worth of goods in any one-year period. (§ 250007)

Without authorization of the credit card issuer and with intent to defraud, soliciting a person for the purpose of offering a credit card or selling information or any application to obtain a credit card. (§ 250007)

Without authorization of the credit card system member or its agent (*i.e.*, or a financial institution or entity such as a credit card issuer), arranging, with intent to defraud, for another person to present to the member or its agent for payment any record of transactions made by a credit card. (§ 250007)

COMPUTER CRIME

Knowingly transmitting a computer program, information, code, or command to a computer used in interstate commerce with intent that the transmission will damage the computer, computer system, data or program or deny the use of the computer or program, if the transmission was without authority and causes more than \$1,000 in damage or loss or modifies or impairs medical care. (§ 290001)

Knowingly transmitting a computer program, information, code, or command to a computer used in interstate commerce with reckless disregard of the risk that the transmission will damage the computer, computer system, data or program or deny the use of the computer or program, if the transmission was without authority and causes more than \$1, 000 in damage or loss or modifies or impairs medical care. (§ 290001)

MOTOR VEHICLE OFFENSES

Knowing disclosure by a State department of motor vehicles or an employee or contractor thereof, except as specifically permitted, of personal information about a person obtained by the department in connection with a motor vehicle record. (§ 300002)

Knowingly obtaining or disclosing for any unauthorized use personal information from a motor vehicle record. (§ 300002)

Making false representations to obtain any personal information

from an individual's motor vehicle record. (§ 300002)

Knowingly removing, obliterating, tampering with, or altering an identification number for a motor vehicle or motor vehicle part. (§ 220003)

Removing, obliterating, tampering with, or altering a theft prevention decal or replica from a motor vehicle with intent to further the theft of a motor vehicle. (§ 220003)

Unauthorized affixing of a theft prevention decal or replica to a motor vehicle. (§ 220003)

INSURANCE FRAUD

Knowingly making a false statement or overvaluing any land or security by an insurance company in connection with any financial report or document presented to an insurance regulatory official or agency, with intent to influence the actions of the official or agency. (§ 320603)

Theft of property of an insurance company by an employee thereof. (§ 320603)

Knowingly making false statement by an insurance company with intent to deceive any person as to the financial condition or solvency of the company. (§ 320603)

Corruptly obstructing any proceeding involving an insurance company pending before any insurance regulatory official or agency. (§ 320603)

Engaging in the business of insurance by a person convicted of a felony involving dishonesty or breach of trust. (§ 320603)

Willfully permitting participation in the business of insurance of a person convicted of a felony involving dishonesty or breach of trust. (§ 320603)

Obstructing by violence or retaliating against a person for participating in any proceeding involving an insurance company pending before any insurance regulatory official or agency. (§ 320604)

Notifying any person of the existence or contents of a subpoena for records of an insurance company, with intent to obstruct a judicial proceeding, if done by an employee of the company. (§ 320604)

Participation in the affairs of a financial institution by a person convicted of a criminal offense involving dishonesty or a breach of trust, or who has agreed to enter into a pretrial diversion program in connection with a prosecution for such offense. (§§ 320605-6)

MONEY LAUNDERING

Laundering of monetary instruments involving the proceeds of traf-

ficking in counterfeit goods and services. (§ 320104)

LOTTERIES

Transmission-Interstate of information for the purpose of procuring a lottery ticket. (§ 320905)

MISCELLANEOUS OFFENSES

Knowingly receiving the proceeds of extortion in violation of federal law. (§ 320601)

Knowingly receiving the proceeds of kidnapping in violation of State law if the proceeds have moved in interstate or foreign commerce. (§ 320601)

Knowingly receiving the proceeds of a Postal robbery. (§ 320602)

Misuse of the initials "DEA" in any publication, play, broadcast, or production in a manner reasonably calculated to convey that it is approved or authorized by DEA. (§ 320911)

Mailing of prohibited injurious animals and plants. (§ 320108)

Knowingly selling a Congressional Medal of Honor. (§ 320109)

Theft of art work from a museum. (§ 320902)

WIRETAPS

Intentionally disclosing the contents of a lawful wiretap after having received the information in connection with a criminal investigation, with intent to obstruct or interfere with such an investigation. (§ 320901)

ATTEMPT OFFENSES

Attempted theft by force within the special maritime or territorial jurisdiction of the United States. (§ 320903)

Attempted robbery of personal property belonging to the United States. (§ 320903)

Attempted robbery of mail of money or other property of the United States. (§ 320903)

Attempted kidnapping of a person willfully transported in interstate commerce, or within the special maritime, aircraft or territorial jurisdiction of the United States. (§ 320903)

Attempted smuggling of goods into the United States. (§ 320903)

Attempted damage to federal government property. (§ 320903)

Attempted willful or malicious injury or destruction of communications lines, stations or systems operated or controlled by the United States, or used for military or civil defense functions of the United States. (§ 320903)

Attempted damaging of an energy facility (*i.e.*, a facility that is in-

volved in the production, storage, or distribution of energy or in related research). (§ 320903)

EXPANDED JURISDICTION FOR CIVIL RIGHTS OFFENSE

Conspiracy to violate the civil rights of non-resident aliens in any State, Territory or District. (§ 320201)

Deprivation under color of law of the civil rights of nonresident aliens in any State, Territory or District. (§ 320201)